

K.B.I. Security Services, Inc. and International Union, United Plant Guard Workers of America (UPGWA). Cases 34-CA-6495 and 34-CA-6667

August 9, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN
AND TRUESDALE

The issue presented here is whether the judge correctly found in Case 34-CA-6667 that the Respondent violated Section 8(a)(1), (3), and (4) of the Act.¹ The Board has considered the decision and the record in light of the exceptions² and the answering brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, K.B.I. Security Services, Inc., Bridgeport, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ On April 20, 1995, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent filed exceptions and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

² There are no exceptions to the judge's disposition of issues presented in Case 34-CA-6495.

Ursula L. Haerter, Esq., for the General Counsel.
Anthony Netto, Branch Manager, for the Respondent.

DECISION

I. INTRODUCTION

STEPHEN J. GROSS, Administrative Law Judge. K.B.I. Security Services (KBI) is owned by Robert King. It is in the business of providing security guards.¹ KBI's main office is in the Bronx, New York. KBI has a number of branch offices, one of which is in Bridgeport, Connecticut. Anthony Netto is the manager of the Bridgeport branch office. The Bridgeport branch employs about 30 guards.

At about the end of November 1993, a few employees of KBI's Bridgeport branch began organizing activities among the employees of that branch. Their intent was to become represented by the International Union, United Plant Guard Workers of America (the Union or the UPGWA).² At issue here is the response of KBI to those union activities.³

¹ KBI admits that it is an employer engaged in commerce.

² KBI admits that the UPGWA is a labor organization within the meaning of Sec. 2(5) of the National Labor Relations Act (the Act).

³ I held the hearing in this matter in Hartford, Connecticut, on November 9 and 10, 1994. Only the General Counsel has filed a brief.

**II. ANGEL RIVERA'S STATUS AS SUPERVISOR
OR EMPLOYEE**

Angel Rivera was employed by KBI in Bridgeport from 1991 until February 1994. What senior KBI officials said to Rivera about employee union activities on behalf of the UPGWA and what Rivera told KBI employees about those communications is relevant to the issues in this proceeding. But the import of those communications varies depending on whether Rivera was a supervisor or an employee of KBI. It is to Rivera's status that I now turn.

As of December 1993, Rivera worked for KBI about 40 hours a week. Rivera spent half or more of those hours doing routine administrative work in KBI's office. (He fingerprinted job applicants, inventoried uniforms, and the like.) That part of his job was not supervisory. But Rivera also spent several nights a week working as a "road supervisor" for KBI.

Much of KBI's guard service is, of course, provided at night. One road supervisor is on duty each night. As a road supervisor, Rivera's job was to visit each of the sites at which KBI has guards, determine whether the guards who were supposed to be on duty were in fact there, and determine whether the guards were "performing at the proper level" (in Netto's words). Proper performance includes, *inter alia*, wearing the prescribed uniform, "maintaining high visibility" (in the words of Road Supervisor Kenneth Cruzado), and properly completing the written reports that the guards are required to maintain.

Road supervisors orally warn guards whose performance is deficient in some minor respect. Road supervisors prepare written warnings for guards who do not shape up or whose deficiencies are more serious. The road supervisor gives those written warnings to Netto "for his final confirmation on it" (again in Cruzado's words). Only Netto has the authority to fire or suspend a guard or to discipline a guard in a manner that goes beyond an oral warning. (It is undisputed that Netto is a supervisor within the meaning of Sec. 2(11).)

Rivera had an additional task as a road supervisor: As the most experienced of the persons working as a road supervisor, he was responsible for training "assistant" road supervisors and for generally supporting such assistant supervisors. Thus Cruzado, speaking about an incident that occurred at the time of the events that are the subject of the complaint, testified:

Because my job was, as assisting supervisor, if something is wrong, and I take care of it, once I'm taking care of it, I'm automatically supposed to advise him [Rivera] and let him know what I did, so if there's any confrontation in the morning, he's aware of everything. And the same thing, he would present it to Mr. Netto in the morning. . . . So everybody has an inline [sic] on everything, so when the client does call, it's all, you know, all done to procedures.

Rivera, as a road supervisor, was paid \$7 an hour; KBI generally paid its guards \$5.50 an hour.

It is clear that Rivera and Cruzado (the only road supervisors to testify) considered that they had authority over KBI's guards, that they had serious responsibilities in terms of ensuring that the guards performed properly, that their status was distinctly superior to the guards, and that that point

of view was not an unreasonable one.⁴ It is also clear that the guards, again not unreasonably, considered road supervisors to be part of management.⁵

I conclude that Rivera, when working as a KBI road supervisor was a “supervisor” within the meaning of Section 2(11) of the Act in that he had the authority to orally discipline guards and to effectively recommend more severe discipline, and that the exercise of such authority required the use of independent judgment.⁶

I earlier noted that some of Rivera’s work for KBI involved administrative, nonsupervisory functions in KBI’s office. But since Rivera spent a “regular and substantial portion” of his time working as a road supervisor, he was a KBI supervisor, not a KBI employee. *Aladdin Hotel*, 270 NLRB 838, 840 (1984).

III. THE ISSUES RAISED BY THE COMPLAINT IN CASE 34-CA-6495

The complaint in Case 34-CA-6495 contains two sets of allegations. One set is based on the assumption that Rivera was an employee of KBI; the other set is based on the assumption that he was a supervisor. Because I have found Rivera to be a supervisor, I deal only with that second set.

KBI employed Hector Rosenthal as a guard. Hector Rosenthal’s wife, Marie Rosenthal, has had experience in organizing employees. In November 1993, she contacted the UPGWA, and she and her husband began organizing activities, covertly, among KBI’s employees. By December, Rivera (the supervisor discussed in the previous section of this decision) had joined the Rosenthals in their organizing efforts.

On December 17, 1993, the UPGWA filed an election petition with Region 34, and a few days later the Region notified KBI of the petition.

On about December 27 King (KBI’s owner) called the Bridgeport branch to discuss the UPGWA’s organizational efforts. King was angry, and he demanded that Netto and Rivera find out which employees were involved with the UPGWA. Netto, in turn, told Rivera and the Bridgeport branch’s one clerical employee, Merrylee Villanueva, to immediately call some of the guards and ask if they had heard anything about a union. Rivera and Villanueva made the

calls, although Rivera was not then able to reach any of the guards.⁷

That night Rivera (as road supervisor) visited the various sites at which KBI’s Bridgeport branch employed guards and told about 10 of the guards that “the shit hit the fan,” that the Company was trying to learn who was involved with the UPGWA, that the Company was going to question them about their involvement with the Union, and that they should not admit to anything.⁸

About the same time, Assistant Road Supervisor Kenneth Cruzado (whom KBI admits is a supervisor within the meaning of Sec. 2(11)), at various jobsites, interrogated employees about their union membership, activities, and sympathies of other employees.⁹

A couple days later, when a few guards came to the office to get their paychecks, Netto asked them if they had heard about any unionization efforts.¹⁰

I conclude that by the above utterances of Netto, Rivera, and Cruzado to the guards whom KBI employed, KBI violated Section 8(a)(1) of the Act.

IV. THE ISSUES RAISED BY THE COMPLAINT IN CASE 34-CA-6667

The complaint in Case 34-CA-6667 issued on September 28, 1994. It alleges, essentially, that on about February 11, 1994, Netto uttered coercive remarks to employees and, since about May 21, 1994, refused to recall employees Hector Rosenthal and Orlando Febus from layoff because of the union activities and other protected concerted activities of the two employees. On August 30, 1994—that is, prior to the issuance of that complaint—Netto wrote to counsel for the General Counsel concerning the alleged incidents upon which the complaint is based. According to the letter, the reason that KBI refused to recall either Rosenthal or Febus was that KBI lost a client “due to thefts from [a] job site when Mr. Rosenthal and Mr. Febus were assigned.”

The complaint itself states that the Board’s Rules and Regulations provide that if KBI failed to file an answer, “all the allegations in the complaint shall be considered to be admitted to be true.” And subsequent to the issuance of the complaint in Case 34-CA-6667, counsel for the General Counsel reminded KBI that Board Rules required that KBI file an answer to the complaint. KBI’s only response to that advice was to refer (orally) to the August 30 letter.

At the hearing, counsel for the General Counsel moved that, because of the absence of an answer, I deem to be admitted all of the allegations of the complaint in Case 34—

⁴ Compare *NLRB v. Security Guard Service*, 384 F.2d 143, 150 (5th Cir. 1967).

⁵ The record shows that Rivera sometimes—perhaps frequently—failed to carry out his assigned duties. But “[t]he failure of a supervisor to exercise his supervisory authority does not change his employment status from that of a supervisor to the status of a rank-and-file employee.” *Babcock & Wilcox Construction Co.*, 288 NLRB 620, 621 fn. 3 (1988).

⁶ Sec. 2(11) reads:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

For cases involving the application of Sec. 2(11) to security guard situations, see *NLRB v. Security Guard Service*, supra; *Gold Shield Security*, 306 NLRB 20 (1992); *Burns Security Services*, 278 NLRB 565 (1986); *California Plant Protection*, 259 NLRB 315 (1981).

⁷ The General Counsel does not contend that anything said to or by Villanueva violated the Act in any respect.

⁸ KBI denied that Rivera “informed employees that he had been instructed by Respondent to ascertain and report to Respondent the Union membership, activities and sympathies of the employees” (par. 13(b) of the complaint in Case 34-CA-6495) but admitted (in its answer) that Rivera “asked if anyone heard about a Union.”

⁹ In making that finding I am quoting par. 13(c) of the complaint in Case 34-CA-6495, which paragraph KBI did not deny. See Tr. 12.

¹⁰ A few days after that Netto engaged in activities that, on their face, seem to have violated Sec. 8(a)(2) of the Act. But nothing in the complaint refers to such activities and counsel for the General Counsel specifically advised that she did not seek to amend the complaint to include any violations of Sec. 8(a)(2).

CA-6667. I granted the motion in respect to all of the allegations of the complaint to which KBI's letter does not refer. As to those allegations to which the letter does refer, I stated that I would deal with that facet of the motion in a posthearing order. I accordingly received testimony during the course of the hearing from both the General Counsel's and KBI's witnesses relating to the complaint's allegations about Febus and Rosenthal. Thereafter, by Order dated November 28, 1994, I granted the General Counsel's motion and ruled that all of the allegations in the complaint in Case 34-CA-6667 were to be deemed admitted.¹¹

Accordingly, based on the allegations of the complaint in Case 34-CA-6667, I find that:

(1) About February 11, 1994, KBI, by Netto, at the Bridgeport facility:

(a) Interrogated its employees about their union membership, activities, and sympathies.

(b) Created the impression among its employees that their union activities were under surveillance by KBI.

(c) Threatened its employees with the closure of the Bridgeport facility if they selected the UPGWA as their bargaining representative.

(2) Since about May 21, 1994, KBI has failed and refused to recall its employees Orlando Febus and Hector Rosenthal from layoff because:

(a) Febus and Rosenthal joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

(b) Febus and Rosenthal gave testimony to the Board or because KBI believed that the named employees gave testimony to the Board.

I conclude that: (a) by the conduct described in paragraphs (1)(a) through (c) above, KBI violated Section 8(a)(1) of the Act; and (b) by the conduct described in paragraph 2 above, KBI discriminated in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act, and discriminated against employees because they gave testimony under the Act, thereby violating Section 8(a)(4) of the Act.

V. REMEDY

Because KBI discriminatorily failed to recall employees Orlando Febus and Hector Rosenthal from layoff, it must offer to reinstate them and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because KBI's owner, Robert King, telephoning from KBI's main office in New York, plainly was the instigator

of the violations of the Act discussed in this decision, the recommended Order requires KBI to post notices at all of its facilities.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The Respondent, K.B.I. Security Services, Inc., Bridgeport, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to recall employees from layoff because the employees joined or assisted the International Union, United Plant Guard Workers of America or any other union.

(b) Failing to recall employees from layoff because the employees gave testimony to the Board.

(c) Interrogating employees about their union membership, activities, or sympathies or about the union membership, activities, or sympathies of other employees.

(d) Creating the impression among its employees that their union activities were under surveillance.

(e) Threatening employees with the closure of any of its facilities if they selected the UPGWA or any other union as their bargaining representative.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer employees Orlando Febus and Hector Rosenthal immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the failure to recall Febus and Rosenthal from layoff and notify Febus and Rosenthal in writing that this has been done and that the failure to recall will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at all of its facilities copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and

¹¹ In my November 28 Order I wrote that "this is a disagreeable order to have to issue" because of certain evidence indicating that KBI may have had appropriate reasons for ending its employment of Febus and Rosenthal. On brief the General Counsel "requests [me] to strike all such remarks from [my] Order as they are unnecessary to the consideration or determination of the motion, and may unduly prejudice the Board and/or the courts in their consideration of the issues in these cases." Br. at fn. 4. I deny the General Counsel's request.

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by other materials.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to recall employees from layoff because the employees joined or assisted the International Union, United Plant Guard Workers of America or any other union.

WE WILL NOT fail to recall employees from layoff because the employees gave testimony to the National Labor Relations Board.

WE WILL NOT interrogate employees about their union membership, activities, or sympathies or about the union membership, activities, or sympathies of other employees.

WE WILL NOT create the impression among our employees that their union activities are under surveillance.

WE WILL NOT threaten employees that we will close any of our facilities if they select the United Plant Guard Workers or any other union as their bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer employees Orlando Febus and Hector Rosenthal immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, less any interim net earnings, plus interest.

WE WILL notify Orlando Febus and Hector Rosenthal that we have removed from our files any reference to our failure to recall them from layoff and that our failure to recall them from layoff will not be used against them in any way.

K.B.I. SECURITY SERVICES, INC.